The Stockton & Visalia railroad co petitioner, vs. the Common council o the city of Stockton, respondent. Reply of the Southern Pacific r.r.co. to the third and last brief of the respondent. S.W.Sanderson, for S.P. r.r.co. 1870.

No. .....

IN THE

Supreme Court

OF THE

STATE OF CALIFORNIA.

THE STOCKTON & VISALIA RAILROAD CO.

Petitioner,

vs.

The Common Council of the City of Stockton,

Respondent,

Reply of the Southern Pacific R. R Co. to the third and last Brief of the Respondent.

S. W. SANDERSON,

FOR S. P. R. R. CO.

SACRAMENTO:

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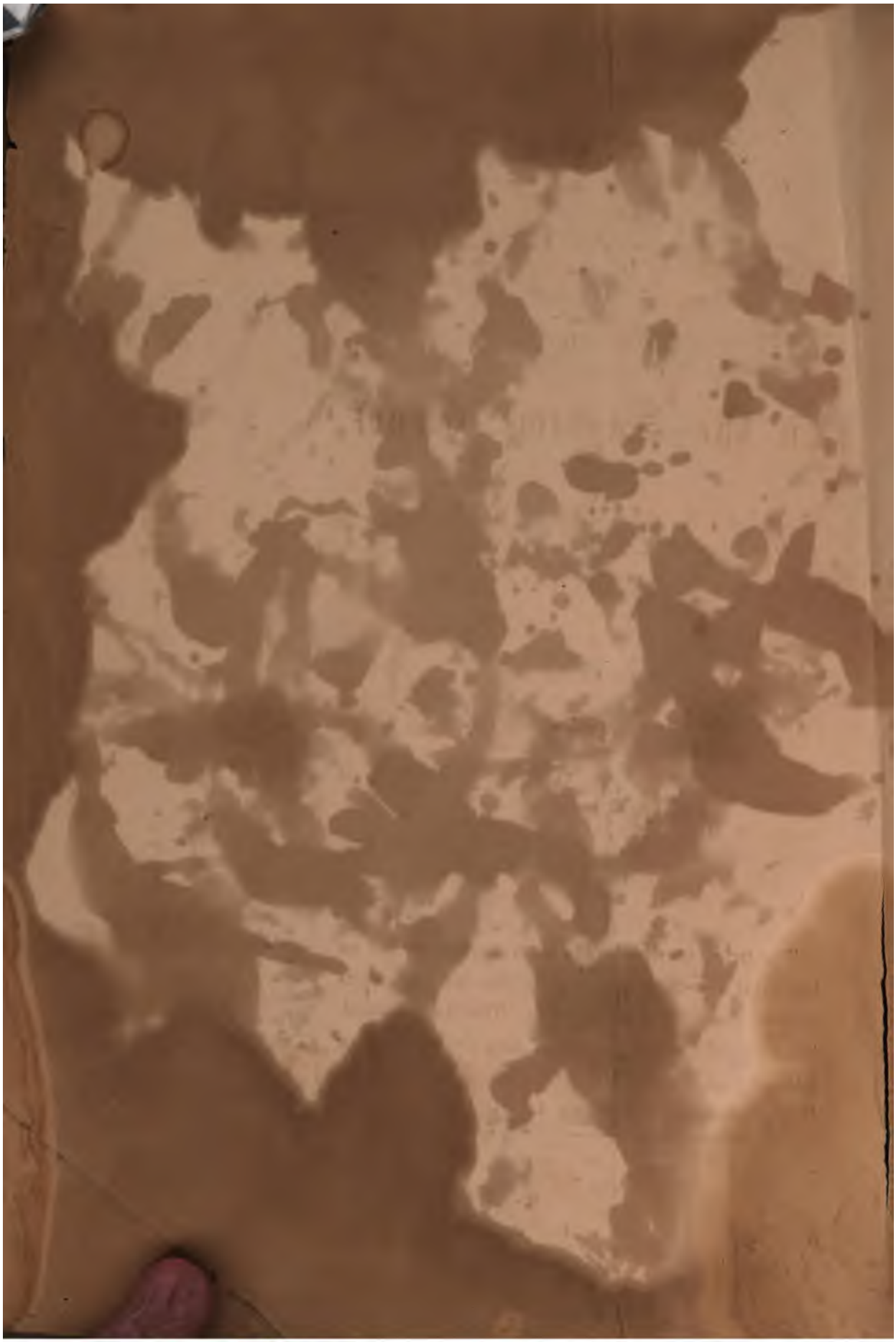

No. .....

In the Supreme Court

OF THE

STATE OF CALIFORNIA.

THE STOCKTON AND VISALIA RAILROAD COMPANY,
Petitioner,

v.

THE COMMON COUNCIL OF THE CITY OF STOCKTON,
Respondent.

REPLY OF THE SOUTHERN PACIFIC R. R. CO. TO THE THIRD AND LAST BRIEF OF THE RESPONDENT.

I.

The brief, to which this is an answer, so far as the vital questions involved in this case are concerned, contains nothing new. This is not said, however, in disparagement of the ability, zeal or industry of its author, for neither is doubted. If he has added nothing to his logic or prece-

dents, the failure is due to the fact that both had been exhausted by his previous efforts. But, while the brief contains nothing new, it virtually abandons a number of points which the author had previously endeavored to maintain. By failing to comment at all upon what has been said in answer, he virtually admits that the several clauses of the Constitution in relation to the inalienable rights of persons—the formation of incorporations other than municipal—the organization of cities and incorporated villages—the loaning of the credit of the State in aid of any individual, association or corporation—and the equality and uniformity of taxation, have no bearing whatever upon the question before the Court. He concedes that his attempt to torture these provisions into restrictions upon the taxing power as exercised, or attempted to be exercised in this case, has failed. Doubtless, he has at last comprehended the true purpose of those provisions, or, if not, has learned that whoever relies upon a multiplicity of constitutional provisions, to establish a repugnancy between an Act of the Legislature and the Constitution—claiming that the Act is repugnant to one of them, but if not, then to another, and so on to the end of the catalogue—in effect concedes, in judicial consideration, the constitutionality of the Act; for where it is doubtful whether the Act be repug-

nant to one or another provision of the Constitution, it is doubtful whether it be repugnant to either, in which case, by every rule of constitutional construction, the Act must be declared valid. This concession, whatever be its cause, has narrowed the discussion, with a single exception to be noticed hereafter, to the question whether railroads are public uses, in the sense of the taxing power, accompanied by the further incidental question, whether what is a public use be a political or judicial question.

II.

Irrelevant and impertinent matter.

The author of the brief, to which this is a reply, has thought proper to introduce into this discussion matters entirely foreign to the question under debate. Being driven from all his positions in relation to the merits of the controversy by the overwhelming weight of authority and the irresistible force of logic, he has undertaken to change the field of combat, in part, and if possible, achieve victory through personal and political prejudice. While regretting the course which he has seen proper to adopt in this respect, I entertain no misgivings as to the result of the contest upon the new field to which I have been invited. If what I have to say in reply should seem out of place, I trust the Court will remem-

ber that the law of self-defense not only justifies resistance, but, in extreme cases, at least, a counter attack.

On the forty-fifth page of the brief, to which this is a reply, will be found a chapter on "Civil Liberty," in which I am accused of making, at the close of my former brief, "a reference to the progress of civil liberty." If such were the fact, I am unable to perceive wherein a reference to civil liberty is out of place in a Court of Justice. But the reference was not to the progress of civil liberty, but to the opposition of certain gentlemen to its progress. I trust the acumen of the author of the brief, to which this is a reply, will enable him to see the distinction. This distinction had to be ignored, however, to enable the author in question to call attention to my political creed, and if possible excite, against me and my cause, political prejudice. He asks "whether, according to my lexicon, civil liberty consists in substituting modern military commissions for antiquated jury trials, inconvertible rag money for coin, disfranchisement, test oaths and centralization of power for the principles of Jefferson and Madison; and whether my political dictionary teaches the doctrine that the people were made for the Government, and not the Government for the people—that men have no rights.

except such as the Government chooses to accord—that monopolies should be protected at the expense of labor—that taxation means plunder of the many for the benefit of the few, and that the main object of legislation is to grant special privileges."

The foregoing is undoubtedly *impertinent*, as respects the question before the Court, and would be impertinent, as respects myself, were I not fully advised that the author has pondered with jaundiced eyes so long upon the several topics referred to, that he has become a monomaniac in reference to all of them. While he labors under his present delusion, I should not be justified in resenting his acts or sayings. Such people must be humored, not crossed. Guided by this consideration, I will proceed to inform him how my lexicon defines civil liberty in the respects mentioned by him, and what my political dictionary teaches in respect to the relations which exist between the people and the Government ordained by them, and some things which it does not teach me.

(*a*)

My lexicon defines civil liberty as being consistent with a substitution of military commissions for jury trials in all cases where treason has

overthrown the civil power, and loyal people, claiming the protection of the Government, can find no safety for life, liberty, or property, except in the military power of the Government.

My lexicon defines civil liberty as being consistent with the substitution of paper money for coin when the Government, ordained by the people, becomes involved in a war against treason for the preservation of itself and free institutions, and needs paper money to keep its armies in the field and its war ships upon the ocean.

My lexicon defines civil liberty as being consistent with the disfranchisement of traitors, under all circumstances—with test oaths, when traitors seek office that they may make it subservient to the purposes of treason—and with the centralization of power, when and so far as it may be necessary to maintain, all over the land, the integrity of the Union upon the principles of American freedom, and that there is nothing in the political tenets of Jefferson or Madison to the contrary.

(*b*)

My "political dictionary" teaches me that while the Government is made for the people, the people are to be governed by it according to the Constitution and the laws made in pursuance

thereof, and not according to limitations and restrictions which designing persons seek to engraft upon it for the purpose of making political capital.

It teaches me that all men have just such rights as the Constitution, and the laws made in pursuance thereof, accord to them, and that no one has the right to deny to them the exercise of those rights because, to his distorted vision, their exercise may seem unwise or impolitic

It does not teach me that monopolies should be protected at the expense of labor, but it does teach me that the cause of labor may be vastly promoted by the judicious exercise of the taxing power in favor of public improvements which are calculated to develop the country and widen the field of labor and production.

It does not teach me that taxation means plunder of the many for the benefit of the few; but it does teach me that taxation means, in part, the power of the Government to call upon the people for a portion of their substance to aid in the construction of works which are needful to the material progress of the country, and to the general good and prosperity of the people.

It does not teach me that granting special privileges is the main object of legislation, but it does teach me that granting them is one of the objects

of legislation, and that they should be granted whenever in the opinion of the Legislature they are required to promote the general good.

(c)

SOME THINGS WHICH MY POLITICAL DICTIONARY DOES NOT TEACH ME.

It does not teach me that it becomes the Chief Executive of the State, who has approved an Act of the Legislature which taxed the county of Plumas to the amount of nineteen per cent. of all its taxable property for the benefit of a visionary railroad company, without submitting the proposition to a vote of the people, to afterwards denounce legislative bodies as dishonest, corrupt and unworthy of the confidence of the people.

It does not teach me that the Chief Executive of the State, who has approved an Act of the Legislature which authorized a lottery in violation of an express provision of the Constitution to the effect that "No lottery shall be authorized by this State, nor shall the sale of lottery tickets be allowed," ought, with Pecksniffian hypocrisy, to lecture either judicial or legislative bodies upon the sanctity of constitutional compacts.

It does not teach me, that, under a Constitu-

tion which declares that the executive, legislative and judicial departments of the Government shall be separate and independent, it becomes the Chief Executive officer of the State to borrow the official robes of the Attorney-General, and in the flimsy disguise thus obtained, to enter the halls of justice and undertake to influence the judgments of the judicial department by the weight of his official character.

It does not teach me that sins of omission are less to be condemned than sins of commission; and that it becomes the Chief Executive of the State to barter his professed Christianity for German votes, by omitting to disapprove an Act of the Legislature which repealed a previous Act to enforce a proper observance of the Lord's day.

And my sense of the fitness of things teaches me that as an appropriate finale to such acts, the Chief Executive ought to clasp his hands, in the attitude of Samson Brass, when the five-pound note, which he had himself put there, was discovered in the hat of Christopher Nubbles, and like him, exclaim, "And this is the world that turns upon its own axis, and has lunar influences, and revolutions round heavenly bodies, and various games of that sort! This is human natur, is it? O, natur, natur!"

III.

"Due Process of Law."

While the author of the brief to which this is a reply has abandoned, as already suggested, most of his subordinate points, he still insists, as I understand him, that the legislation in question is repugnant to the clause of the Constitution which forbids the taking of life, liberty or property "without due process of law." In relation to the construction given to that clause of the Constitution in my former brief, at the sixth page of his brief, he says:

> "The elucidation of the force and effect of the clause of the Bill of Rights forbidding the deprivation of citizen's property without due process of law, will hardly be concurred in by this Court."

In support of this proposition, the case of *Cohen* vs. *Wright*, 22 Cal. 293, is cited. After a careful examination of that case, I have been unable to discover wherein the construction of the clause in question there given differs from mine. I said that the clause in question had no application to the exercise of the taxing power, but related to judicial proceedings, and was intended to secure to the citizen the right of trial by jury, according to the course of the common law, which is precisely what was said by this Court in the case cited, which was as follows:

"The terms 'due process of law' have a distinct legal signification, clearly securing to every person, whether a citizen or not, without distinction of sex or race, *a judicial trial*, according to the established rules of law, before he can be deprived of life, liberty or property." (Page 318.)

Such being the object of this clause, it can have no bearing upon the present question, which is purely one of taxation, which has always acted by methods of its own, which methods have not been judicial, as I took occasion to show in my former brief. As the author of the brief to which this is a reply still adheres to his first position, I now take occasion to cite a few more authorities, which show that Acts of the Legislature acting under the taxing power, are unaffected by this clause of the Constitution.

The Tax Law of Michigan of 1853 provided that: "If any person shall refuse or neglect to pay the tax imposed on him, the Treasurer shall levy the same by distress and sale of goods and chattels of said person, *or of any goods and chattels in his possession.*" * * * "And no claim of property to be made thereto by any other person shall be available to prevent a sale." Giving the owner of the property sold to pay the tax of another a remedy against the person taxed. In the case of *Sears* vs. *Cottrell* (5 Mich. 251) it was argued that this law, so far as it authorized the taking of the property of A to pay B's taxes, if

it happened to be in B's possession, authorized a taking "without due process of law." The Court held that that clause of the Constitution had no bearing upon the question. The Court said:

"The words 'due process of law' mean the law of the land, and are to be so understood in the Constitution. By *magna charta* it was provided, 'no freeman shall be taken, or imprisoned, or dispossessed of his free tenements and liberties, or outlawed, or banished, or any wise hurt or injured, unless by the legal judgment of his peers, or by the law of the land.' Lord Coke construed the words 'law of the land' to mean *due process of law.* Hence we sometimes find one phraseology used and sometimes the other. * * * By 'the law of the land' we understand laws that are general in their operation and that affect the rights of all alike; and not a special Act of the Legislature passed to affect the rights of an *individual* against his will, and in a way in which the same rights of other persons are not affected by existing laws. * * * The law in question is not one of this class. It was not designed or intended to operate on the rights of the plaintiff, or any other individual, as such. This is of itself sufficient to take it from under this part of the Constitution, however obnoxious it may be to other parts of that instrument." (Page 254.)

If a law imposing a tax be considered repugnant to this clause of the Bill of Rights, then for the same reason a law authorizing the taking of private property, under the power of eminent domain, must also be repugnant to it. To be consistent, the author of the brief to which this is an answer must go to that extent, which illustrates the absurdity of his position. The truth is that this clause of the Bill of Rights has no effect

upon the powers of eminent domain or taxation, which act by methods and for purposes of their own, in no way intended to be regulated by the clause in question.

In *Ervine's Appeal*, 16 Penn. St. 257, it was held that the object of this provision was to secure the right to notice to appear and answer, and *to a remedy in Court* before the citizen can be deprived of his property, or life, or liberty, taking the same view which has been hereinbefore expressed. For further definitions of this clause, see

Wynehamer v. *The People*, 13 N. Y. 378.
Hoke v. *Henderson*, 4 Lev. 1.
Jones v. *Perry*, 10 Ferg. 59.
Taylor v. *Porter*, 4 Hill 140.
Embury v. *Conner*, 3 Comstock, 511.
Powers v. *Bergen*, 2 Selden, 358.

A full and clear exposition of the historical and critical meaning of the words "due process of law," as used in the Constitution of the United States, will be found in the case of *Murray's Lessee et al* v. *Hoboken Land and Improvement Co.*, 18 How. U. S. 272. It is there shown conclusively that those words have no reference whatever to the steps or proceedings which may be taken by Congress for the purpose of levying and collecting taxes, or enforcing the claims of the Government against its defaulting revenue officers. They are designed

it happened to be in B's possession, authorized a taking "without due process of law." The Court held that that clause of the Constitution had no bearing upon the question. The Court said:

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to secure the benefit of judicial proceedings in all cases where, according to the course of the common law, judicial proceedings were in use before *magna charta*, and not in cases where by the custom and practice of Parliament no such proceedings were in use, to which class of cases the imposition and collection of taxes belonged. Before *magna charta*, and since, taxes have been imposed and collected by the legislative and executive departments, without the aid or interference of the judicial department. This previous and subsequent practice demonstrates that this clause of *magna charta* was not intended to regulate in any sense the nature or exercise of the taxing power, but to secure to the subject the right to the judgment of his peers whenever, according to the course of the common law, his life, liberty or property should come in question. To accomplish the same object it has been incorporated into American Constitutions, and it subserves no other. In the opinion recently delivered by the Supreme Court of Iowa, which will be found at the close of this brief, it is said:

"Due process of law means ordinary judicial proceedings in Court (*Royal* v. *Ellis*, 11 Gown 99; *Ex parte Grace*, 12 id. 214; *Taylor* v. *Potter*, 4 Hill, 140). So that if this clause of the Constitution is held to apply to the taxing power, then no tax whatever for the support of the Government can be legally levied and collected, except through the means of judicial proceedings in the Courts; whereas

it is well known that the sovereign power of taxation belongs exclusively to the legislative department of the Government, and that all taxes are levied and collected in pursuance of legislative enactments, without the aid of the Courts. This clause has no reference whatever to the taxing power, and where property is taken in the lawful exercise of the taxing power it is not taken without due process of law."

IV.

Taxation for Private Use.

The author of the brief to which this is a reply, charges me with ambiguity in admitting that taxation can be resorted to for public purposes only, for the sake of the argument, but denying the abstract proposition. I admitted for the sake of the argument, that the power of taxation could not be exercised for a private purpose, but as an abstract proposition I could not admit that such was the case, for the daily practice of governments is to the contrary. It was wholly unnecessary, for the purposes of this case, to inquire how far the power of taxation can be exercised for private purposes, that is to say, purposes not of a governmental character, and I was content therefore with a simple reservation of the question. I now refer to the matter for the purpose of removing any ambiguity that may be involved in the admission by explaining my meaning. The private purposes for which the power of taxation may be exercised are such as spring from

[illegible] gratitude or charity. [illegible] where there is [illegible] a meritorious [illegible] claim [illegible] Examples are found in [illegible] which the widows of the poor are [illegible] where the [illegible] and [illegible] where the [illegible] and the [illegible] and [illegible] grants of pensions [illegible] meritorious services rendered to the country by the recipients. Even Judge Cooley, a *conservative*, does not question the right of legislative bodies to exercise the taxing power in behalf of such purposes, whatever he might do as *Judge*. (Cooley's Constitutional Limitations, 488 *et seq.*) A most notable example of an exercise of the taxing power for a purely private purpose is found in the legislation of this State, where a stipend of three thousand dollars per annum has been granted to John A. Sutter. Said the Supreme Court of Wisconsin, in the case of *Brodhead* vs. *The City of Milwaukee*, 19 Wis. 652: "It is not denied that claims founded in equity and justice, in the largest sense of those terms, or in gratitude or charity, will support a tax. Such is the language of the authorities." See also *Booth* vs. *Woodbury*, 32 Conn. 128.

V.

Stare Decisis.

On his forty-fourth page, the author of the brief to which this is an answer, under the heading of "*Policy*," charges me with stating facts *dehors* the record in stating as I did that it had been estimated that $3,000,000 of bonds had been issued in this State under legislation of this character, and had passed into the hands of private parties who had purchased them upon the faith of the decisions of this Court that the statutes under which they had been issued were valid.

In the discussion of a question of *stare decisis*, I believe it is not unusual to refer to matters which constitute a part of the legislative and judicial history of the State, without affording any occasion to an adversary to charge one with stating facts *dehors* the record. The statutes by virtue of which these bonds have been issued are public statutes of which this Court will take judicial notice; and its own records show that such bonds have been issued to a large amount. So far, therefore, from being convinced that I have transgressed the boundaries of forensic debate, I am induced by what counsel has said to refer to the matter again, and call the attention of the Court to the amount of bonds which the Legislature has granted the right to issue, and the

amount which has been actually issued, according to information in my possession. The cursory examination which I have been able to make of the statutes since 1857, has resulted as follows:

	Amount.		Year.	Page.
Yuba county	$200,000	Statutes	1857	296
Sutter county	50 000	"	'59	247
Solano county	200,000	"	'59	266
Yolo county	50,000	"	'59	270
San Mateo county	100,000	"	'60	230
San Francisco county	600,000	"	'60	233
Santa Clara county	200,000	"	'60	261
Placer county	100 000	"	'60	344
Santa Clara county	200 000	"	'61	128
San Mateo county	100,000	"	'61	134
San Francisco county	300,000	"	'61	198
Los Angeles city	50,000	"	'61	457
Los Angeles county	100 000	"	'61	465
San Joaquin county	250,000	"	'63	80
Placerville (city)	100,000	"	'63	86
San Joaquin county	100,000	"	'63	102
El Dorado county	200.000	"	'63	122
Placer county	250.000	"	'63	145
Santa Clara county	150 000	"	'63	276
Stanislaus county	25,000	"	'63	310
Alameda county	220,000	"	'63	365
San Francisco county	1,000,000	"	'63	580
Sacramento county	300,000	"	'63	447
Calaveras county	50,000	"	'63	673
Tuolumne county	50,000	"	'63	679
El Dorado county	100.000	"	'63-4	378
Calaveras county	50.000	"	'65-6	759
Napa county (say)	70.000	"	'65-6	810
Stanislaus county	25,000	"	'65-6	543
Yuba county	65,000	"	'65-6	75, 373
Yolo county	100,000	"	'67-8	268
Los Angeles county	150,000	"	'67-8	14
Los Angeles city	75.000	"	'67-8	20
Plumas county	230,000	"	'67-8	630
Sutter county	50.000	"	'67-8	155
San Joaquin county	200.000	"	'69-70	532
Stockton (city)	300,000	"	'69-70	551
San Francisco	1.000 000	"	'69-70	707
Total	$6,360,000			

Under the foregoing statutes it is known that bonds have been actually issued as follows:

Yuba county	$265,000
Solano county	200,000
San Mateo county	100,000
San Francisco county	950,000
Santa Clara county	350,000
Auburn (town)	50,000
Los Angeles county	150,000
San Joaquin county	250,000
Placerville (city)	100,000
El Dorado county	300,000
Placer county	250,000
Sacramento county	300,000
Total	$3 265,000

In addition, a large amount has been issued by Napa county to the Napa Valley Railroad Company, but the precise amount is not known. How many more have been issued is unknown. In addition to the amount above specified, the State has assumed the interest on $1,500,000 for twenty years, amounting in the aggregate to more than $2,000,000. Some of these bonds were issued as donations, and some in payment of subscriptions for stock.

The author of the brief to which this is a reply, assures the Court that not one-sixth of these bonds would be affected by a decision against the validity of this legislation; that they are held by non-residents, who could collect them notwithstanding the decision of this Court against

their validity, under the rule in *Gelpcke* v. *Dubuque*, 1 Wallace, 175.

The decision in that case is clearly untenable, and there is every reason to believe that it will not be adhered to in the future (see dissenting opinion of. Mr. Justice Miller). But concede that it is law, and will remain so, the bondholders in this case will undoubtedly share the fate of the bondholders in that case, who for seven years have been engaged in a fruitless effort to collect their bonds. For an account of the present condition of their case, see American Law Review for October, 1870, page 170. A condition of affairs amounting almost to insurrection now exists in Iowa growing out of the judicial conflict between the Federal and State Courts.

In this connection it is worthy of notice that all of the foregoing legislation which was enacted at the last two sessions of the Legislature received the approval of the present Executive of the State, notwithstanding some of it was the most onerous and impolitic of all our legislation upon this subject; as, for example, the Act in relation to Plumas county, which, *without submitting the proposition to a vote of the people*, imperatively imposed upon the people of that county a burden equal to nineteen per cent. of all their taxable property, and further provided that the Supervisors, and

every other county officer charged with duties under the Act, should be deemed guilty of misdemeanor if they should willfully fail.neglect or refuse to perform any of said duties, and upon conviction thereof should be punished by a fine of five hundred dollars and be removed from office, and should, in addition to these penalties, be liable for all damages sustained by any person by reason of such failure or neglect. That such legislation should have received the sanction of the Executive is not, perhaps, surprising; but it is surprising that after having given his official sanction to such legislation, he should afterwards, through the public press, denounce it, not as unwise and impolitic merely, but as obviously unconstitutional. And it is still more surprising that he should have participated as leading counsel in a judicial contest involving its validity. Such a course, it is believed, is without a parallel in history, certainly in American history, and every one, who believes in the perfect independence of the three departments of the Government, must forever regret this attempt upon the part of the Executive to control the other departments in the exercise of their appropriate functions. That he is a lawyer of great ability, zeal and industry, the briefs filed in this case, over the official signature of the Attorney-General, attest. But his ability, zeal and industry cannot be accepted as a justification of the

course which he has pursued. On the contrary, the greater the ability, the greater will be the mischief which may result from such practices. But I have not referred to this matter for the purpose of calling attention to his course as being a breach of official propriety, but for the purposes of fair and legitimate argument. I have a right, as a matter of argument, to appeal from Philip drunk to Philip sober. As a matter of argument I have a right to strip my adversary of his flimsy disguise, and submit, whether the opinions of the author of the brief to which this is a reply, as counsel, are more likely to be conscientious and sound, than the opinions of the same person as Governor, acting under a full sense of all the responsibilities of his lofty position, and all the solemnities of an oath to support the Constitution and faithfully perform all the duties of his office. When official character is thrown into the scales to give weight to an argument, I have a right to inspect it—to weigh it in my own scales—to ascertain whether it all belongs to the bowl into which it has been cast—and whether upon dissection it may not turn out that half or more ought to be thrown into the opposite bowl. For that purpose—not for personal reasons—I have referred to the inconsistencies in which the author of the brief to which this is a reply, has involved himself. That they justly

detract from the force of what he has now to say in this case, I think no one will deny.

Having disposed of the various irrelevant matters which the author of the brief to which this is a reply has thought proper to introduce into this discussion, as well as the subordinate points of his argument, I will now notice what he has to say in relation to the vital questions upon which the decision of this case must depend.

VI.

Public Use a Political Question.

I do not propose to do more, under this head, than to call the attention of the Court to some authorities not cited in my former brief. I desire to premise, however, that when I say it rests with the Legislature to determine what are public uses in behalf of which the powers of eminent domain and taxation may be exercised, I do not desire to be understood as holding that under the theory of our Government the Legislature in this respect possesses the absolute power of the English Parliament. I may admit, without detracting from the force of the argument, that the Legislature has no power to declare that to be a public burden which by the common consent of mankind is not. But this doctrine rests upon the same ground upon which philosophers, rather

than jurists, base the doctrine that no Legislature, not even the Parliament of England, has power to pass an act which contravenes natural justice or the laws of God. Such questions, however, belong to the department of the moralist rather than that of the jurist. They are wholly speculative and never arise in practice. There is no more reason to apprehend that the Legislature will declare that to be a public burden, which by the common consent of mankind is not a public burden, than that it will pass a law in violation of natural justice or of the laws of God, which it is believed has never occurred in American history. Hence, humanly, or judicially, speaking, we say the Legislature is the judge of what are proper public burdens, in the absence of any clear or explicit constitutional restriction. *Theoretically* it may be claimed that it is possible for the Legislature to declare that to be a public use which by common consent is a private use, and that in such a case the judicial department would have the power to annul the declaration of the Legislature by its own declaration to the contrary. Such power, however, would not be recognized for a moment in English Courts, either in theory or practice, and while it may be asserted in theory by American Courts, yet in practice no occasion ever arises for its application, and for all the pur-

poses of forensic discussion it should be put aside as a false quantity.

I am willing to accept the following language of Judge Cooley, *as commentator*, as furnishing the true rule upon this subject :

"Taxes should only be levied for those purposes which properly constitute a public burden. But what is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the Legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion—which cannot be controlled by the Courts, except *perhaps* where its action is clearly evasive, and where, under pretense of lawful authority, it has assumed to exercise one that is unlawful. Where the power which is exercised is legislative in its character, the Courts can enforce only those limitations which the Constitution imposes, and not those implied restrictions which, *resting in theory only*, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives." (Constitutional Limitations, p. 129.)

It will be observed that Judge Cooley here admits that the implied limitations of the Constitution, about which so much has been said in the course of this discussion, cannot be enforced by the Courts, which is an admission that for all practical purposes the discretion of the Legislature has no limit save in its own judgment.

At page 488, he further says, upon the same subject :

"It must always be conceded that the proper authority to determine what should and what should not properly

constitute a public burden is the legislative department of the State. * * * *And in determining this question, the Legislature cannot be held to any narrow or technical rule.* * * * There will therefore be *necessary* expenditures, and expenditures which rest upon considerations of policy alone; and in regard to one as much as the other, the decision of that department to which alone questions of State policy are addressed, must be accepted as conclusive."

In keeping with this rule, the Supreme Court of Pennsylvania has said:

"The exercise of the taxing power by the Legislature must become wanton and unjust—be so grossly perverted as to lose the character of a legislative function—before the judiciary will feel themselves entitled to interpose on constitutional grounds. To arrest the legislation of a free people, especially in reference to burthens self-imposed for the common good, is to restrain the popular sovereignty, and should have clear warrant in the letter of the fundamental law." (*Schenley* v. *Alleghany*, 25 Penn. St. R., 130)

So has said the Supreme Court of Kentucky:

"A tax law must be considered valid unless it be for a purpose in which the community taxed has palpably no interest; where it is apparent that a burden is imposed for the benefit of others, and where it would be so pronounced at first blush." (*Cheney* v. *Hooser*, 9 B. Monroe, 345.)

Let political philosophers, or even commentators upon the law, if they will, speculate in their closets as to what the Judiciary might, could, would, or should do in the event the Legislature might, could, would, or should do something which it never has done and which there is no reason to apprehend it ever will do. Such spec-

ulations are visionary and of no practical use to the Judge upon the bench or the advocate at the bar. Time spent upon their consideration is as much wasted as it would be if consumed in considering whether Archimedes could have moved the Earth with his lever if he could only have found a place for his fulcrum. The Judge deals with things as they exist and not with abstractions. For all the purposes of judicial action he must consider the Legislature as having the right to use the taxing power according to its own judgment and discretion where there is no plain or palpable constitutional restriction. The rule by which he is guided has been thus declared by Chief Justice Marshall:

"This vital power may be abused; but the interest, wisdom, and justice of the representative body and its relations with its constituents, furnish *the only security against unjust and excessive taxation,* as well as against unwise legislation generally." (4 Peters, 463.)

VII.

Railroads Public Uses.

The author of the brief to which this is a reply, undertakes to show that railroads are private enterprises and not public improvements, by defining public and private corporations. At page nine he defines them thus:

"A private corporation is an association formed by private citizens for the purpose of deriving pecuniary

profit from the transaction of any specified business, or for charitable, moral, or religious objects.

"A public corporation has for its object the government of some portion of the State," adding—"so say the books, without any conflict."

With the first I find no fault. The second was adopted at a time when a large class of corporations, now familiar to all, was wholly unknown. It was adopted at an age when Governments exercised their sovereign powers by their immediate or political agents, and did not delegate them to private individuals or corporations—at a time when the world traveled in post-carriages or stage coaches, and commerce transported her commodities in slow-moving vans. Since then discovery and invention have added to the wants of mankind as well as supplied them. Since then science has placed her hands upon the elements and felt their power—invention has put them in harness and subjected them to the dominion of mankind. A complete revolution has taken place in the modes of travel and transportation, and the change thus effected has become indispensable to the necessities and conveniences of mankind. We cannot now go back to stage coaches and prairie schooners or pack-mules. The world cannot dispense with railroad corporations if it would. They must have a place in legal definition. They differ from all which have come before them. They possess distinctive

features, and do not fall wholly within the definition of either public or private corporations, as such corporations existed at the time of their coming. On the contrary, they possessed the distinctive qualities of each. The object of their creation was two-fold—private advantage and the performance of a governmental duty or the exercise of a governmental power—in respect to the former they were essentially private, but in respect to the latter they were as essentially public, for they took the place of the government, in respect to one of its most onerous and clearly defined duties and obligations. If the object of definition be to distinguish the thing defined from every other thing, it is obvious that this object will not be accomplished by calling such corporations either public or private, for they are *Janus* faced, and look both to public and to private interests. Hence from their first creation to the present time, they have been characterised, both in legislative and judicial parlance, as *quasi public —quasi private.* This appellation is not of modern date, as suggested by the other side; it is as old as the corporations to which it has been applied. It was not adopted, as suggested by the other side, to please the fancy of certain modern jurists, who wish to convert private into public corporations, that a ready way may be opened to the pockets of the tax-payer, but to give a fit and ap-

propriate designation to that which was new and unlike all that had gone before.

The difference between a railroad corporation and a private corporation was well described by the Supreme Court of Michigan more than eighteen years ago. Contrast what that Court then said, with what, speaking by the mouth of Judge Cooley, it has recently said, and the fallacy of its later utterances will become apparent to the dullest comprehension.

"The object of strictly private corporations is to aggregate the capital, the talents, and the skill of individuals, to foster industry and encourage the arts. Private advantage is the ultimate as well as the immediate object of their creation, and such as results to the public is incidental, growing out of the general benefits acquired by the application of combined capital, skill, and talent, to the pursuits of commerce and of trade, and the necessities and conveniences of the community. But the object and origin of that class of corporations represented by the Defendants in this case, and *which might with far more propriety be styled public than private corporations*, are of an altogether different nature and character. Their very *existence* is based upon the delegation to them of the sovereign power to take private property for public use, and upon the continual exercise of that power in the use of the property for the purposes for which it was condemned. *They are the means employed to carry into execution a given power.* That private property can be taken by the Government from one and bestowed upon another for private use, will not for a moment be contended, and these corporations can only be sustained upon the assumption that *the powers delegated are to a public agent to work out a public use.* To say, as has been too often carelessly said, that the acts done by these corporations are done with a view to

their own interests, from which an incidental benefit springs to the public, is to admit their private character and the private use of the property condemned to their use. *But it is obvious that the object which determines the character of a corporation is that designated by the Legislature, rather than that sought by the company.* If the object be primarily the private interests of its members, although an incidental benefit may accrue to the Government therefrom, then the corporation is private; but if that object be the public interest, to be secured by the exercise of *powers delegated for that purpose*, which would otherwise repose in the State, then, although private interests may be incidentally promoted, *the corporation is in its nature public.* It is essentially the *trustee* of the Government for the promotion of the objects desired—a mere *agent* to which authority is delegated *to work out the public interest* through the means provided by Government for that purpose, and broadly distinguishable from one created for the attainment of no public end, and from which no benefit accrues to the community, except such as results incidentally, and not necessarily, from its operation. In the creation of these corporations, *public duties* and *public* interests are involved, and the discharge of those duties and the attainment of those interests are the *primary objects* to be worked out through the powers delegated to them. To secure these, the right of pre-eminent sovereignty is exercised by the condemnation of lands to their use, *a right which can never be exercised for private purposes.*

"How then can they be regarded as private associations, from the acts of which an incidental benefit only springs to the public? It argues nothing that compensation is required to be made for property taken before it can be used, for this is made by the Constitution a condition to the exercise of this right by the Government itself, and the delegation of the power necessarily carries the incident with it. Nor can it be said that the property, when taken, is not used by the public, but by the corporators, for their own profit and advantage. It is unquestionably true that these enterprises may be, and probably

always are, undertaken with a view to private emolument on the part of the corporators; but it is none the less true that the object of the Government in creating them is *public utility* and that *private benefit*, instead of being the *occasion* of the grant, is but the *reward* springing from the service.

"If this is not the correct view, then we confess we are unable to find any authority in the Government to accomplish any work of public utility through any private medium, or by delegated authority.

"Yet all past history tells us that governments have more frequently effected these purposes through the aid of companies and corporations than by their immediate agents, and all experience tells us that this is the most wise and economical method of securing these improvements. The grant to the corporation is in no essential particular different from *the employment of commissioners or agents*. The difference is in degree rather than in principle, in compensation rather than in power. The fact that the company receives the toll or compensation for the transportation of persons and property over the road is conceived to be a reason, and in fact the prominent reason, why these associations should be considered as private corporations; *but the purpose designed by the Government in the construction of these roads* IS THE USE OF THE PUBLIC, *the expeditious communication and transit from point to point, and not revenue.*

"It would not be contended for a moment that private property would be taken to be used for the latter purpose. The appropriation of the tolls, therefore, can be regarded only as compensation, and affords no basis upon which to construct an argument respecting the character of the company, or the validity of the charter. It is true, also, that the mode of conveyance and of travel is different upon this road from that upon turnpikes and common highways, but this difference springs from the character and construction of the road, and the vehicle employed, and not in the use designed. The one is equally intended, however, to open good and easy communication with the other; and so far as travel and the transportation of prop-

erty is concerned, *the public have the same rights in the one case as in the other*, with this difference, the means employed are varied with the mode of travel. The fact that upon railroads individuals do not travel or transport property in their own vehicles, furnishes no argument in this particular, from the fact that the nature of the road, as well as the personal safety of individuals, renders it impossible that they should do so. If the right existed it would not be exercised. Public security requires that the mode of travel and the means employed should be limited within and subject to the control of the company, and the Legislature would have but indifferently secured the public interest in extending the privilege to all." (*Swan* v. *Williams*, 2 Mich. 427.)

I have quoted at length from this case because it seems to me to present fully, and in a very clear and forcible manner, the reasons why railroad corporations have hitherto been considered by legislative and judicial bodies to be more of a public than private character, and, also, a complete refutation of all the arguments which have been commonly used to establish a contrary doctrine. To my mind, the logic of Chief Justice Martin, by whom the opinion was delivered, seems unanswerable. Contrast it with the later utterances of the same tribunal, by the mouth of Judge Cooley, and the latter dwindle down to the baldest sophistry.

(*a*)

Neither Judge Cooley, nor the author of the brief to which this is a reply, questions the power

of the Government to delegate the power of eminent domain to railroad corporations. They appreciate the fact that without the power such corporations could not exist—could not accomplish the objects of their creation.

Now if either of those gentlemen should be asked why municipal corporations are classed as public corporations, he would undoubtedly reply, because they are endowed by the Legislature with a portion of the sovereign powers of the State to be exercised in a given locality and for certain specified objects. Nor would either of them insist that their public character depends upon the extent or magnitude of the powers delegated to them. They would both agree that the city of Placerville is as much a public corporation as the city of San Francisco, notwithstanding the latter is endowed with much more of the sovereignty of the State than the former. Upon what principle then can a public character be denied to railroad corporations? The same test of character is found in their case, for they are endowed by the Legislature with a part of the sovereignty of the State—the power of eminent domain, which, like municipal corporations, they use and can use only as the *agents or trustees* of the State.

In this connection I desire to refer again to the

case of *Osborn* v. *The United States Bank* (9 Wheaton, 860). The sole question was whether the corporation known as the United States Bank was a public or private corporation. It had been created by Congress for the purpose of effecting the fiscal operations of the National Government —*a public purpose.* Yet four-fifths of its capital stock was private property, and it was engaged in a private banking business from which individual profit was derived. Two propositions were decided—that Congress had no power to create *private corporations*, the Federal Government being a government of delegated powers, and the power to create private corporations not being among the powers delegated; but that Congress had the power to create corporations as instrumentalities by which to carry out a delegated power; and that such corporations were to be classed as *public corporations.* Now, if the Bank of the United States, as was decided in that case, was a public corporation, because Congress had created it as a *public agent* to carry into effect the powers of the Federal Government in relation to its public revenues, by what logic can it be made to appear that railroad corporations which are endowed with sovereign power, in its most pre-eminent form, for the purpose of enabling them to act as the *agent* of the State in performing one of its most onerous duties, are not also to be classed as *public* corporations?

Again: the Union Pacific Railroad Company was incorporated by Congress for the purpose of constructing a railroad that might be kept at the service of the National Government for postal and military purposes. Suppose the question should come before the Supreme Court of the United States whether the Union Pacific Railroad Company is a private or public corporation. There can be no doubt as to what the decision would be. The language would be: "Congress has no power to create private corporations, for no such power has been delegated to the Federal Government; but Congress has power to create corporations for the purpose of carrying into effect any of the powers which have been delegated to the Federal Government. Among the powers which have been delegated to the Federal Government is the power to build roads for postal and military purposes, which is a public, national object. Congress has created the Union Pacific Railroad Company as a *public agent* to build a railroad for postal and military purposes. It is therefore a public corporation, notwithstanding all its capital stock is owned by private individuals, and the road is operated for their private profit as well as to subserve the postal and military purposes of the General Government."

This logic is of equal force when applied to railroad corporations created by State Legisla-

tures, for they too are created to enable the State Governments to carry into effect the powers which they possess in relation to roads and highways, which are works of equal public utility and in greater and more pressing demand.

(*b*)

Why the author of the brief to which this is a reply, should have cited the case of *Hammet* vs. *Philadelphia* as authority upon the question whether railroad corporations are purely private or *quasi* public, I have been wholly unable to perceive, and I think no one can discern its pertinence except one whose legal acumen is adequate to the task of amending the Federal Constitution without changing it. It does not deal with the question in the remotest degree, and does not, as stated, overrule the *Sharpless case*. That case has never been overruled by any Court in the State of Pennsylvania. Its effect has been abrogated by a constitutional amendment. The statement "that Judge Sharswood has declared the *Sharpless* case to be no longer authority," illustrates the candor (?) of its author, when we turn to the case and find that Judge Sharswood did so for the reason *that it had been abrogated by a constitutional amendment*, and for no other.

The case was not decided last July, as stated, but was decided some time prior to July, 1869,

for I find it published in the *American Law Register* for July, 1869. The question involved was whether the lot owners on Broad street, in the City of Philadelphia, could be assessed for paving the street with an expensive wooden pavement authorized, not because the street required a new pavement for the ordinary purposes of travel or use as a highway, but for the sake of making it, in the language of the Court, "a great public drive—a pleasure ground—along which elegant equipages may disport of an afternoon." The preamble of the Act, which authorized the improvement, recited that it was "for the uses and purposes of the public, and the benefits and advantages which will enure to them by making and forever maintaining Broad street, in the City of Philadelphia, for its entire length as the same is now opened, or may hereafter be opened, *the principal avenue of said city.*" It was held, in effect, that an avenue of that character, and for such an object, was not local in its benefits, but, like a park, was general in its benefits--*being so declared in the Act itself*—and could not therefore be considered as a mere local improvement to be made at the expense of the owners of lands bordering upon the street, but an improvement general in its benefits to the whole city, and therefore to be paid for by general city taxation. The case is obviously not in

point, and adds no weight to the argument in support of which it has been cited. No one will contend that the power of local taxation for local improvements, founded as it is on local benefit, could be exercised upon the owners of lands which border upon it for the creation and maintainance of Central Park in the city of New York, intended, as it is, for the use of the entire city as a pleasure ground, or place of resort for healthful amusement and recreation. The improvement of Broad street, in the manner proposed, had the same object in view, *by express legislative designation*, and the attempt to cast the burden of the improvement solely upon the owners of lots upon the street, instead of the tax-payers at large, was, as the Court considered, an abuse of the power of local taxation *palpable* upon the face of the statute, and for that reason, and that only, the Court held the statute to be void. In view of the ground upon which the decision is put, the case cannot be considered as asserting the power of the judiciary to review and overthrow the judgment of the Legislature upon a question of benefit in relation to a local improvement. But if it is to be so considered, it is sufficient to say that it is opposed to every other case upon the same subject.

(*c*)

For the purpose of showing that railroads are

not so far public objects as to justify the exercise of the taxing power to aid their construction, when being built by corporations, the author of the brief to which this is a reply, reiterates his former argument, founded upon what he considered analogous cases. The argument is that hotels, hacks, stage coaches, drays, etc , subserve a public purpose as well as railroads, and that, it being conceded that taxation cannot be resorted to for the purpose of aiding the former, it cannot be resorted to for the purpose of aiding the latter.

For the purposes of the argument, an analogy is assumed where none exists. Analogical reasoning is the most uncertain and unsatisfactory of all, and if the supposed parallel existed, the argument would be entitled to little weight. But no parallel can be drawn between railroad corporations and the proprietors of hotels, etc. It may be conceded that both accommodate a public want, but the wants supplied are in no respects alike. The opening of hotels, the running of stage coaches, hacks, drays, etc., have never been considered as being incumbent upon *Governments*. Governments have never undertaken to keep hotel, run stage coaches, etc., and it never has been considered that there was any moral or legal obligation resting upon them to do so. But the duty of opening of highways, canals, and

other like improvements for the accommodation of travel and commerce, has always been considered most binding upon all Governments. So in this respect the parallel wholly fails.

Again. The power of eminent domain has never been vested in hotel keepers, stage coach proprietors, hackmen, nor draymen; nor has it been supposed that there was any reason or necessity why it should be. But the power of eminent domain has, from the commencement, been vested in railroad corporations, and it is acknowledged by all that they cannot exist without it. So the supposed parallel again fails.

Again: The Legislature has never undertaken to regulate hotel charges, or stage coach fares, and while hackmen and draymen are limited in their charges by municipal governments, it is done as a police regulation. But from the commencement, Legislatures have regulated fares and freights upon railroads. So the supposed parallel again fails. It therefore fails in every particular which can serve as a test of the question under consideration. For a complete answer to this kind of logic, see the dissenting opinion of Judge Graves in the Michigan case. (*American Law Review*, October, 1870, p. 138.

(*d*)

In my former brief I referred to the acknow-

ledged power of the Legislature to regulate fares and freights, as an evidence of the public character of railroad corporations. The only answer attempted is that this is one of the conditions upon which the right to be a railroad corporation is granted, and because the public welfare requires the exercise of this control by the sovereign. Instead of this being an answer to the argument founded upon the regulation of fares and freights by the Legislature, it is but a restatement of that argument in a different form, for the question still remains—why is such a condition imposed? and why does the sovereign reserve and exercise the right of regulating fares and freights? If railroad corporations are purely private corporations, that is to say, stand with respect to the Government upon the same level with trading, mining, manufacturing and other like corporations, why is it no such power has ever been exercised in respect to the latter? There can be but one explanation of this difference, and that is that the latter corporations possess none of the powers of sovereignty; they in no respect act as the agents of the sovereign; they perform none of the duties, discharge none of the obligations of the sovereign to the people, and hence the sovereign has no more power to annex such conditions to their corporate being than it has to impose them upon an individual engaged in the

same business; while on the other hand railroad corporations are engaged in the performance of a duty or obligation resting upon the Government, which, by common consent, cannot be performed except by the exercise of sovereign power, of which they are accordingly made the *trustees*. The fact that they are the *agents* or *trustees* of the Government distinguishes them from mere trading, manufacturing and mining corporations, and constitutes the sole ground upon which the right of the Government to regulate their fares and freights is, or can be, rationally based.

(*e*)

The fallacy that railroads conducted and operated by the Government are public improvements, but railroads constructed and operated by individuals or corporations are private enterprises, is again repeated. This fallacy is so transparent that it need hardly be noticed. That the *use* to which a thing is applied must be the test of its character—as public or private—and not the *agency* by which it is applied, would seem to be too plain for argument.

The last decision of the Supreme Court of Iowa upon the question involved in this case, will be found annexed to this brief. It has been

printed from a certified copy which was ordered for the purposes of my former brief, but failed to reach here in time.

S. W. SANDERSON,

For the S. P. R. R. Co.

RAILROAD TAX LAW.

Opinion of the Supreme Court upon the Constitutionality of the Railroad Tax Law.

J. B. STEWART, *Appellant.*

vs.

THE BOARD OF SUPERVISORS OF POLK COUNTY, *Appellees.*

Appeal from the Order of the Judge of Polk District Court.

STATEMENT OF THE CASE.

Petition in equity, by the plaintiff, a property owner, against the Board of Supervisors of Polk county, for an injunction to restrain the levy of a tax voted by the qualified electors of Des Moines and Lee townships respectively, in said county, under an act of the General Assembly, approved April 12th, 1870, entitled "An Act to enable townships, incorporated towns and cities to aid in the construction of railroads."

The petition was presented to the Judge of the District Court—Hon. H. W. Maxwell—in vacation. The defendants appeared and filed an answer, and on a hearing the injunction was refused, from which refusal the plaintiff appeals.

Bancroft & Hatch, for Appellant.
Polk & Hubbell, for Appellee.

OPINION.

MILLER, J.—The case before us raises the question of the validity of Chapter 102, of the laws of the Thirteenth General Assembly, granting local aid to railroads.

No question of superior importance and gravity is ever presented to the Courts for adjudication than one involving the validity of an act of the legislative department of the Government, and none demands more careful examination and serious consideration in its determination.

This is peculiarly true in this case, inasmuch as an act of like character to the one under consideration, was held void by a majority of this Court in Hanson et al. vs. Vernon, et al., June term, 1869; and that a subsequent General Assembly, by the passage of the act of April, 1870, re-asserted the power denied them in that case.

If this case but involved a second time the validity of the act of 1868, annulled by this Court in the case referred to, we might regard the question as to *that* act settled by that case; but as the General Assembly has re-asserted its authority and re-enacted the law with important modifications, we have treated the question as still an open one, and have given it as full and careful examination and consideration as we are capable of.

The first section of the act declares "that it shall be lawful for any township, incorporated town, or city, to aid in the construction of any projected railroad in this State, as hereinafter provided."

"SECTION 2. Whenever a petition shall be presented to the council or trustees of any incorporated township, city or trustee of any township, signed by one-third of the resident taxpayers of such township, city or town, asking the question of aiding in the construction of any railroad to be submitted to the voters thereof, it shall be the duty of the trustees, or council, or Board of Trustees to immediately give notice of a special election, by publication in some newspaper published in the county, if any be published therein, and also by posting said notice in five public places in each township, city or town at least twenty days before said election, which notice shall specify the

time and place of holding said election, the line of road proposed to be aided, the rate per centum of tax to be raised, and the township or townships, incorporated town, or city, in which such tax shall be expended; at which election the question of "taxation" or "no taxation" shall be submitted, and if a majority of the votes polled be "for taxation," then, in that case, the Township Clerk, Recorder, or clerk of said election shall forthwith certify to the County Auditor the rate per centum of the tax thus voted by such township, city, or town. The Board of Supervisors shall, at the time of levying the ordinary taxes next following said special election, levy all taxes voted under the provisions of this act, and cause the same to be placed on the tax lists of the proper townships, cities or towns, and said taxes shall be collected at the same time, in the same manner, and be subject to the same penalties for non-payment as other taxes: *Provided*, that the aggregate amount of tax levied under the provisions of this act in any township, city or town, shall not exceed five per centum of the assessed value of the property of said township, city or town."

"SECTION 3. The funds collected under the provisions of this act shall be paid out by the County Treasurer to the treasurer of the railroad company, upon the orders of the president or managing director of the railroad company whose road such tax has been voted to aid; which orders shall be accompanied by sworn estimates of the engineer in charge of the work on such road, showing that double the amount of such orders has been expended for the construction of such road, in accordance with the terms of the notice provided for in section two of this act, and also by a certificate signed by the members of the council, or Board of Trustees, or a majority of the members thereof, of the township, city or town voting the tax for which said orders are drawn, to the effect that the provisions of this act have been so complied with as to entitle said company to the amount called for by such orders, and it is hereby expressly provided that no part of the funds raised under the provis-

ions of this act shall be expended in any other townships than those specified in the notice of election: *Provided*, however, that should the taxes not be drawn from the county treasury in accordance with the provisions of this act by the railroad company in whose favor the same may have been voted, within two years after the date of the collection thereof, then the right of said railroad company to said funds shall be deemed forfeited, and the same shall be repaid by the County Treasurer to the persons from whom the same may have been collected."

"SECTION 4. All railroads constructed by or with the aid of any taxes levied and collected under the provisions of this act, shall be subject to the control of the General Assembly in regard to the management of the same and the charges for the transportation of freight and passengers thereon."

The authority and power of the Courts to annul an act of the Legislature in conflict with the fundamental law has been repeatedly asserted, and is now universally acknowledged. While this authority is unanimously conceded, the cases, with entire uniformity, hold that it is never to be exercised in doubtful cases.

The Supreme Court of New York, in Clark v. The People, 26 Wend., 599, says that "the power of the Courts of justice to declare the nullity of legislative acts which violate the provisions either of the Constitution of the United States or of the State, while it is undoubted, should be exercised with extreme caution, and never where a serious doubt exists as to the true interpretation of the provisions alleged to be repugnant."

In Illinois it is said that the true inquiry is whether "the will of the representatives, as expressed in the law, is or is not in conflict with the will of the people, as expressed in the Constitution, and unless it is clear that the Legislature has transcended its authority, the Courts will not interfere." (Lane et al. v. Dorman et ux., 3 Scam, 238.)

See also in support of this rule the following cases:

Foster et al. v. The Essex Bank, 16 Mass., 245; The Farmers and Mechanics' Bank v. Smith, 3 Serg. and R. 63–73.

Many other cases might be cited, but I forbear, as this Court has frequently declared the same doctrine.

In Santo v. The State, 2 Iowa, 208, it is said by Mr. Justice Woodward that "although the power is universally admitted, its exercise is considered of the most delicate and responsible nature, and it is not resorted to unless the case be clear, decisive and unavoidable. It is the duty of the Court to give an act such construction, if possible, as will maintain it;" citing Rice v. Foster, 4 Harring, Del., 479; Fisher v. McGin, etc., 1 Gray, 1; Maize v. The State, 4 Ind., 342; Commonwealth v. Williams, 11 Penn., 61; State v. Cooper, 5 Blackford, 258; 2 Peters, 522; Ogden v. Saunders, 12 Wheat., 270; 19 Johnson, 58; 1 Com., 550; Calder v. Bull, 3 Dall, 386; Fletcher v. Peck, 6 Cran., 87.

In the case of Morrison v. Springer, 15 Iowa, 304, this Court held that it "will declare a law unconstitutional *only* when it is *clearly, palpably and plainly inconsistent* with the provisions of that instrument;" and Mr. Justice Wright in his opinion in that case cites a long list of authorities in support of the rule announced.

See also McCormick v. Rush, 15 Iowa, 127; Whiting & Whiting v. City of Mt. Pleasant, 11 Iowa, 482–485; McGregor v. Bayles, 19 Iowa, 43; Duncombe vs. Prindle, 12 Iowa, 1.

The same rule of construction has been declared in Massachusetts, Pennsylvania and other States.

Adams v. Howe, 14 Mass., 345; Sharpless v. The Mayor, etc., 21 Penn., 162; Thorp v. R. R. Co., 21 Vt., 142; The People v. Draper, 15 N. Y., 543.

Having seen that Courts of justice are authorized to declare a legislative act unconstitutional and void only when it violates that instrument *clearly, palpably, plainly*, and in such manner as to leave no reasonable doubt, we proceed to inquire whether there is any check or legislative power independent of or in addition to those which are to be found in the Constitution, or, in other words, whether the Courts possess the power to amend an act of the Legislature for any other reason than that of its *plain, clear and palpable* violation of the *written* Constitution.

It is said that "the judiciary may arrest acts of the Legislature on the ground that they are unjust and immoral," "that there are certain principles of natural justice which not even the Legislature can be permitted to disregard." It is conceded that the power of the Legislature must be confined to "making laws." It cannot administer or execute them. So the very words of the Constitution which vests the power of legislation in the General Assembly, exclude the judiciary from any share in it; and such sh re they will undoubtedly possess if they are at liberty to refuse to execute a statute, on the grounds that it is not in harmony with their notions of morality and justice. Mr. Sedgwick, in his work on statutory and constitutional law, says: "Constitutional provisions may be ambiguous; the doctrine of interpretation is vague; but these branches of judicial authority are subject to some tests, and can be circumscribed within some limits. But who will undertake to decide what are the principles of eternal justice? And who can pretend to fix any limits to the judicial power, if they have the right to annul the operations of the Legislature on the ground that they are repugnant to natural right? There may be, there always will be questions not only as to the expediency, but the justice of laws. But questions of public policy and State necessity are not meant to be assigned to the domains of the Courts. The right of construction, the right of applying constitutional restrictions, are vast powers, which it will always require great sagacity and intelligence to exercise. Let the judiciary rest contented with its acknowledged prerogatives, and not attempt to arrogate an authority so vague and so dangerous as the power to define and declare the doctrines of natural law and abstract right," in the construction of statutes. (Sedg. on Stat. and Con. Law, 182.)

These views of the learned author we approve and adopt. The same views are held by many of the soundest Judges and legal writers.

Mr. Justice Cowan, of the New York Supreme Court, in Butler v. Pilmer, 1 Hill, 324, holds this language: "Strong expressions may be found in the books against legislative

interference with vested rights; but it is not conceivable that, after allowing the few restrictions found in the Federal and State Constitutions, any further bounds can be set to legislative power by written prescription." And Chancellor Kent says: "Where it is said that a statute is contrary to natural equity or reason, or repugnant or impossible to be performed, the cases are understood to mean that the Court is to give them a reasonable construction. They will not presume that every unjust or absurd consequence was within the contemplation of the law." (1 Kent's Com., p. 408.)

And Mr. Justice Baldwin, of the Supreme Court of the United States, used this language: "We cannot declare a legislative act void because it conflicts with our opinions of policy, expediency or justice. We are not the guardians of the rights of the people of the State, unless they are secured by some constitutional provision which comes within our judicial cognizance. The remedy for unwise or oppressive legislation, within constitutional bounds, is by appeal to the justice and patriotism of the representatives of the people. If this fail, the people, in their sovereign capacity, can correct the evil; but the Courts cannot assume their rights. There is no *paramount* and *supreme* law which defines the law of nature, or settles those great principles of legislation which are said to control State Legislatures in the exercise of the powers conferred on them by the people in the Constitution." (Bennett v. Boggs, 1 Bald., 74–75. See also, in support of the same views, Cochran v. Van Surley, 20 Wend., 381; Kirby v. Shaw, 7 Harris Penn. R., 258; State v. Dawson, 2 Hill R., S. C, 100; People v. Mayor of Brooklyn, 4 Coms., 423; Town of Guilford v. Cornell, 18 Barb., 615; Sharpless v. The Mayor, etc., 21 Penn., 147; Braddee v. Brownfield, 2 Watts & Serg., 271; Harvey v. Thomas, 10 Watts, 63; Calder v. Bull, 3 Dallas, 386; Fletcher v. Peck, 6 Cranch, 87; Bloodgood v. Mohawk and Hudson R. R. Co. 18 Wend., 9; Terret v. Taylor, 9 Cranch, 43; Bonaparte v. Camden and Amboy R. R. Co., 1 Bald. C. C. R., 205)

There are authorities which hold the contrary doctrine, and in doing so usually take refuge behind that clause in

the Bill of Rights which declares: "The enumeration of rights shall not be construed to impair or deny others, retained by the people."

Now let us inquire *what* legislative rights, other than those contained in the Constitution, are "retained by the people."

The second section of the Bill of Rights declares: "*All political power is inherent in the people.*" Political power consists of the three great attributes of sovereignty, namely: *legislative*, *executive* and *judicial* authority. This is *all inherent* in the people. These powers, then, are supreme in the people, in the first instance. *All the legislative* as well as the executive and judicial power is inherent in them. By section 1, of Article 3, of the Constitution, we find that "*the* legislative authority of this State shall be vested in a General Assembly," etc.

The people, then, have vested *the* legislative authority *inherent in them* in the General Assembly. The people were the original possessors of *all* the legislative authority in the State. By this section they vest it *all* in the General Assembly. Subsequently, in the same instrument, they withdraw some portions of this authority, and impose certain restrictions upon the exercise of the authority granted. It follows, therefore, as a logical sequence, that, within these limitations and restrictions, the legislative power of the General Assembly is supreme; that it is bounded only by the limitations *written* in the Constitution. Wright, Justice, in Morrison v. Springer, 15 Iowa, 342, says: "The Legislature clearly has the power to legislate on all rightful subjects of legislation, unless expressly prohibited from so doing, or where the prohibition is implied from some express provision. *This theory must never be lost sight of by the Courts in examining the powers of the Legislature. It is elementary, cardinal,* and frequently possesses controlling weight in determining the constitutional validity of their enactment. *The General Assembly possesses all legislative authority* not delegated to the General Government, *or prohibited by the Constitution.*"

Thus it seems clear by logical deduction, and upon the most abundant authority, that this Court has no authority

to annul an act of the Legislature unless it is found to be in clear, palpable and direct conflict with the written Constitution.

We come now to inquire whether the act of 1870, authorizing local aid to railroads, is so *clearly, palpably and directly* in violation of our State Constitution as that it becomes the province of this Court to annul it.

It is urged that the act, in providing for the levy and collection of a tax, which, when collected, is to be paid over to a private corporation, is unconstitutional, on the ground that it conflicts with section 18, of the Bill of Rights, which declares: "Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof," etc. The argument is that, by implication, the taking of private property for *private* use is forbidden by this section.

That the Legislature has no constitutional authority to take the private property of A and give it to B, there can be no reasonable doubt.

The difficulty, however, seems to be in ascertaining what is a *public use* and what a *private use*, within the meaning of this section. This clause is a restriction upon the right of eminent domain. But for this restraint the Legislature would have power to authorize the taking of private property for public use without making any compensation. The right to exercise the power of eminent domain *only* exists when the object is a public one. Every State exercises this power in behalf of railroads, turnpikes, canals and other internal improvements, and this is done without reference to whether the State holds any pecuniary interest in the improvement or not. Upon our statute book will be found laws of this character. It has been the law of this State for twenty years without question that, "whenever any corporation or other person designs to construct a canal or a railroad, a turnpike, graded, macadamized, or plank road, or a bridge, as a work of *public utility*, *although for private profit*, it may take such reasonable amount of private real property as may be requisite for a right of way, etc., upon paying such sum as may be assessed," etc.

Revision of 1860, section 1,278. So also the act of 1853, granting the right of way to railroad companies alone. Revision, page 218.

And it has been the law of this State for more than a quarter of a century that any private citizen who will erect a *mill* to grind grain for toll, may erect a dam and have a writ *ad quod damnum* for the condemnation of the land overflown as for a public purpose.

Laws of 1843, ch. 102.

Laws of 1855, ch. 92, Rev., sec. 1 264.

Laws of 1866, ch. 119.

The validity of these statutes, and that the purposes were *public* ones, within the meaning of the Constitution, although, in the language of section 1,278 of the Revision, it be "for *private profit*," has been too often and too uniformly recognized to be now disputed.

See Gammell v. Potter, 6 Iowa, 548.

Lummery v. Bradley, 7 Iowa, 33.

See also Cowgill v. Essex Mill, 6 Pick., 94.

Boston v. Newman, 12 Pick., 467.

These acts can be sustained only on the ground that the objects to be promoted by them were *public;* that the exercise of the right of eminent domain in behalf of railroads, canals, turnpikes, plank-roads, bridges, mills, etc., is upon the principle, that being of *public* "*utility*," although for "*private profit*" they are for "*public use*," within the meaning of the Constitution.

The cases are numerous and uniformly in accord with this view.

The right of the Legislature to exercise the power of eminent domain in behalf of railroads has always been upheld by the Courts on the ground that the *use was a public one.* Indeed this is elementary and unquestionable.

See 2 Kent's Com., 339–340; Beekman vs. The Saratoga & S. R. R. Co., 3 Paige, 45.

The case last cited is the leading American case upon this subject. The point was expressly made that taking *private* property for the use of a railroad was not taking it for *public use,* and therefore forbidden by the Constitution of New York. The clear and conclusive language of the

Chancellor has often been quoted and followed, and never overruled.

In speaking of the power of eminent domain, he says: "The right of *eminent domain* does not however imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, *where the public interest will be in no way promoted by such transfer.* But if the *public interest can be in any way* promoted by the taking of private property, *it must rest in the wisdom of the Legislature,* to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain and to interfere with the private rights of individuals for that purpose. It is upon this principle that the Legislature of several States have authorized the condemnation of the lands of individuals for mill sites, where from the nature of the country such mill sites could not be obtained for the accommodation of the inhabitants without overflowing the lands thus condemned. *Upon the same principle of public benefit,* not only the agents of the Government, but also *individuals and corporate bodies* have been authorized to take private property for the purpose of making public highways, *turnpike roads,* and canals; of erecting and constructing wharfs and basins; of establishing ferries; of draining swamps and marshes; and of bringing water to cities and villages. *In all such cases,* the object of the legislative power is the public benefit derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the Government, or through the medium of *corporate bodies, or of individual enterprise.*"

Chief Justice Marshall, in the case of Wilson vs. The Blackbird Creek Marsh Co., 2 Peters, 251, says: "Measures calculated to produce *such* benefits to the public, though effected through the medium of a *private corporation,* are undoubtedly within the powers reserved to the States."

In Swan v. Williams, 2 Mich. R. 427, the question before the Court was whether "property taken by a railroad company was a taking for *public use* within the meaning of the Constitution," and it was decided in the affirmative.

Mr. Justice Martin in that case says: "Most certain it is that as to all their rights, powers and responsibilities, *three* grand classes of corporations exist: First—Political or municipal corporations, such as counties, towns, cities and villages, which from their nature, are subject to the unlimited control of the Legislature. Second—Those associations which are created for *public benefit* and to which the Government delegates a portion of its sovereign power to be exercised for *public utility*, such as turnpike, bridge, canal and railroad companies; and, third—Strictly *private* corporations, where the *private interest* of the corporators is the *primary* object of the association, such as banking, insurance, manufacturing and trading companies." "The *object* defines the *character* of these associations, by whatever name they may be styled."

The learned Judge further says that in the creation of that class of corporations to which railroad companies belong, "the public duties and public interests are involved, and in the discharge of these duties, and the attainment of these interests, are the primary objects to be worked out through the powers delegated to them. To secure these, the right of pre-eminent-sovereignty is exercised by the condemnation of lands to their use—a right which can never be exercised for private purposes. How then can they be regarded as *private* associations?"

"Nor can it be said that the property, when taken, is not used by the public, but by the corporation for its own benefit and advantage. It is unquestionably true that these enterprises may be, and probably always are, undertaken with a view to private emoluments on the part of the corporators, but it is none the less true that the object of the Government in creating them is *public utility*, and that private benefit, instead of being the occasion of the grant, is but the reward springing from the service. If this be not the correct view, then we confess we are unable to find any authority in the Government to accomplish any work of public utility through any private medium, or by delegated authority; yet all past history tells us that Governments have more frequently effected these purposes through the aid of corporations and com-

panies than by their immediate agents; and all experience tells us that this is the most wise and economical method of securing these improvements."

In support of these views see the following cases:

Blodgett v. Mohawk & H. R. R. R. Co., 18 Wend. 1; 7 Pick. R. 496; 2 N. Hamp. R. 25; 20 Johnson R. 442–443; Stewart v. Land, 1 Cranch, 299; Amboy Turnpike, 5 John. Ch. 112; Pratt v. Brown, 3 Wis. 612; Robins v. R. R., 6 Wis. 636; Soens v. Racine, 10 Wis. 280; Corpt. of N. Y. v. Coates, 7 Cow. R. 585.

The right to exercise the power of eminent domain in behalf of railroads and other improvements of public utility is recognized by all Courts, and denied by no one. While admitting this right it is said that the Legislature has no constitutional power to levy a tax on the property of the citizens in aid of a railroad corporation, because it is a mere private enterprise.

It has been abundantly shown that the *object* for which the right of eminent domain is exercised is a *public* one, for *public* utility, for "*public use*," within the meaning of the Constitution; that this right can be exercised in behalf of these corporations upon no other ground. If then the building of a railroad is a public object so as to authorize the taking of the private real property of the citizen—the highest species of property—for a right of way, is it any less a public object for the purpose of receiving aid through the medium of taxation to assist in building the road upon such right of way? The right of eminent domain and the taxing power are both sovereign powers. The former is limited to *public uses* by express words in the Constitution. The latter is not, nor is it limited at all except that the Legislature shall not pass any law to compel any person "to pay tithes, taxes, or other rates, for building or repairing places of worship, or the maintenance of any minister or ministry." Conceding, however, that the taxing power *ought* not to be exercised except in behalf of a public object, it is unquestionable that it may be exercised for public purposes—for any object that will justify the exercise of the right of eminent domain. If the State

can, for any purpose, take the land of a citizen, it may tax him for a like purpose. The object or purpose should be a public one in either case. But it would be absurd to say that the right of the citizen to prevent his property from being taken for other than public uses, which is secured by express constitutional limitation, may be overridden, but that his right to save his money from being applied, through the process of taxation, to other than public uses, which right is *not* embodied in the Constitution, must be respected. And yet such absurdity is involved in the position that the citizen's real property may be taken absolutely to aid in the construction of a private enterprise—a railroad—while his money cannot be taken by the process of taxation to aid in the same enterprise. The proposition is that you may not tax the property holder to aid the construction of a railroad, although the taxing power is not limited in the Constitution, yet you may take his land for the same purpose, notwithstanding the right to thus take is limited to "public purposes." If the taxing power cannot be constitutionally invoked in aid of railroads, neither can the power of eminent domain. If the act under consideration is in conflict with the Constitution, in that it taxes the people in aid of the construction of railroads (or rather allows the people to tax themselves), then all the legislation of this and every other State, invoking the power of eminent domain in behalf of railroads, and other like internal improvements, are unconstitutional; and all the adjudication of the Courts for more than a century, sustaining such exercise of the right of eminent domain, are based upon false premises, and are erroneous. To be consistent we must hold these corporations and the object and purpose of the creation to be *private*, and that neither the power of eminent domain, nor the power of taxation can be invoked to aid in their construction, or that they are created for *public utility*, to promote the public interest and convenience, and that both of those powers may be constitutionally exercised to aid in their construction.

If they are *private* interests for the one purpose, they are also for the other; if they are public for one they are

for the other. If the taking of private property for the right of way of a railroad, is a taking for "*public use*," so also is the imposition of a tax to aid in the construction of the road, an exercise of the taxing power for a *public purpose*. This view is in accord with the whole course of legislation of all the States, in regard to internal improvements, and is sustained by a current of judicial decisions that cannot be consistently repudiated.

Every railroad, canal and turnpike road in the United States has been built by the aid of such legislation—granting to them a right of way—based upon the principle that the *object* was a *public* one, justifying the invocation of sovereign power in their construction. This species of legislation, whether in the nature of grants of right of way to railroads, canals and turnpikes, or by authorizing local aid, through the process of taxation, in their construction, has been sustained by the highest Courts of almost every State in the Union, upon this ground and upon none other.

In addition to cases already cited herein, see the following:

Livingston v. Mayor of New York, 8 Wend. 85; in matter of opening Furnam street, 17 Wend. 649; Sutton's Heirs v. Louisville, 5 Dana, 30: City of Lexington v. McQuillen's Heirs, 9 Dana, 513.

While the right to take private property for public use is conditioned upon making compensation, the taxing power is not thus limited. Indeed, the very idea of taxation implies the power to collect levies of money from the people without making any direct pecuniary compensation. The only revenue possessed by the State is derived from taxation, and it would be absurd to say that she should compensate the citizen for taxes collected.

It is well settled, that this clause of the Constitution requiring compensation to be made where private property is taken for public use, is not a limitation upon the taxing power. See the following cases:

The People v. Mayor of Brooklyn, 4 Coms. [illegible]; Town of Guilford v. Corn[illegible]arb. 615; [illegible] Same v. Supervisors of Chenango Co., 3 Kern. 147; Kirby v. Shaw, 19 Penn. R. 258; Williams v. Mayor of Detroit, 2 Mich. 560;

McMasters v. Commonwealth, 3 Watts, 292; In the matter of the District of Pittsburg, 2 Watts and Serg. 320; In matter of Fenlon's Petition, 7 Penn. 173; Extension of Hancock street, 18 Penn. 26; Sharpless v. City of Philadelphia, 9 Harris, 147; Schenly and Wife v. Allegheny City, 25 Penn. 128; Nichols v. Bridgeport, 23 Conn. 189; Griffin v. The Mayor, 4 Coms. 419; Commonwealth v. Alger, 7 Cush. 53; Cummings v. Police Jury, 9 La. 503; Moers v. City of Reading, 21 Penn. 188; Slick v. Maysville and Lexington Railroad Co., 13 B. Monroe, 1; Justices of Clarke County v. P. W. and R. R. Turnpike Co., 11 B. Mon 143.

The taxing power being one of the sovereign powers vested in the General Assembly by the people, and not being limited, either expressly or by clear implication, in the Constitution, to the condition of making compensation, the judicial power possesses no authority to thus limit it.

The conclusion, therefore, is, that as the Legislature may constitutionally exercise the right of eminent domain which *is* limited by the Constitution, in aid of the construction of railroads and other internal improvements of public utility, so also may it exercise the taxing power, which is *not* limited, in aid of the same objects.

It is objected that a railroad differs from other public highways, such as turnpikes and canals, because travelers cannot use it with their own carriages, and farmers cannot transport their own produce in their own vehicles. Chancellor Walworth, answering this objection, says: "*If the making of a railroad will enable the traveler to go from one place to another without the [illegible] a carriage and horses,* he derives *a greater benefit* from the improvement than if he was compelled to travel with his own conveyance over *a turnpike road at the same expense.* And if a mode of conveyance has been discovered by which a farmer can procure his produce to be transported to market at half the expense which it would cost him to carry it there with his own wagon and horses, there is no reason why the *public should not enjoy the benefit of the discovery.*"

"The *public* have an *interest in the use of the railroad,* and

the owners may be prosecuted for damages sustained, if they refuse to transport an individual or his property without reasonable excuse, upon being paid the usual rate or fare." (Beekman v. Saratoga and S. R. R. Co., 3 Paige, 45.)

And in Swan v. Williams, 2 Mich. R. 427, the Court says: "The fact that upon railroads individuals do not travel or transport property in their own vehicles, *furnishes no argument in this particular*, from the fact that the nature of the road, as well as the personal safety of individuals, renders it impossible that it should do so."

It is also said that the last clause of the 9th section of the "Bill of Rights," which declares that "no person shall be deprived of life, liberty, or property, without *due process of law*," is infringed by the Act of 1870.

"Due process of law" means ordinary judicial proceedings in Court. Boyd v. Ellis, 11 Iowa, 99; Ex parte Grace, 12 id. 214; Taylor v. Potter, 4 Hill, 140. So that if this clause of the Constitution is held to apply to the taxing power, then no tax whatever for the support of the Government can be legally levied and collected, except through the means of judicial proceedings in the Courts; whereas it is well known that the sovereign power of taxation belongs exclusively to the legislative department of the Government, and that all taxes are levied and collected in pursuance of legislative enactments, without the aid of the Courts. This clause has no reference whatever to the taxing power, and where property is taken in the lawful exercise of the taxing power, it is not taken "without due process of law."

Allen v. Armstrong, [redacted] 512; [redacted]oll v. Weeks, 2 Tenn. R. 215; Harris v. Wood, 6 B. Mon. 633; Livingston v. Moore, 7 Peters' R. 669.

It was said by Chief Justice Dillon in Hanson v. Vernon, that this Court, in the Wapello County case, 13 Iowa, 388, had held, that "The Legislature could not, under any circumstances, pass an Act which will make it lawful for a county or city, in its corporate capacity, to subscribe stock in a railroad company, and that it was

impossible "to hold the Act of 1868 to be valid and yet stand by the decision" in that case.

When it is remembered that until the passage of the Act of 1868, the Legislature of Iowa had never passed any Act *purporting* to authorize anything of the kind, and that no such question was before the Court in the Wapello County case, or in any other of the numerous cases involving the validity of city and county railroad bonds, it will be plain enough that whatever may have been said about the constitutionality of an Act authorizing the issue of bonds by municipal corporations was only *dictum*. The real decision, in the case in 13 Iowa, was, that the Legislature had never authorized the municipal corporations of this State to subscribe stock to railroads, issue bonds, and levy and collect taxes to pay the same, and that those municipal corporations possessed no power independent of express legislative authority to subscribe to the stock of railroad companies, issue bonds therefor, and levy and collect local taxes to pay the same. To that decision, and to the whole series of decisions of this Court, holding invalid county and city bonds issued for that purpose, we give our unqualified approval." But it is given on the grounds that the General Assembly had never passed any Act conferring the power, and that without such legislation it did not exist.

This question of the constitutional power of the Legislature to authorize municipal corporations to aid by local tax in the construction of railroads within the territory of such municipal corporations, has been before the highest judicial tribunals of at least twenty-one of the States and the Supreme Court of the United States, and in every instance the power has been affirmed, until quite recently in the Supreme Courts of Michigan and Wisconsin, and in this Court in the case of Hanson v. Vernon. See the following cases:

Sharpless v. The Mayor, etc., 21 Penn. St. R. 147; Commonwealth v. Perkins, 43 ibid. 410; The People *ex rel.* v. Mitchell, 35 N. Y. R. 550; Clarke v. City of Rochester, 28 ibid. 605; Gould v. the Town of Venice, 29 Barb. 442; Slack v. City of Maysville, 13 B. Mon. 1; Maddox v. Gra-

ham, 2 Metcalf (Ky.), 56; Nicoll v. Mayor, 9 Hum. (Tenn.), 252; Goddin v. Cramp, 8 Leigh (Va.), 120; City of Bridgeport v. Housatonic R. R. Co., 15 Conn. 475; Society for Savings v. New London, 29 ibid. 174; Cin. R. R. Co. v Commissioners, 1 Ohio St. R. 77; State, etc., v. Commissioners, 12 ib. 596; Shoemaker v. Goshen, 14 ib. 569; Prettyman v. Supervisors, 19 Ill. 406; Butler v Dunham, 27 Ill. 474, and cases cited; Gibbons v. Mobile, etc., R. R. Co., 36 Ala 410; Robinson v. Bidwell, 22 Cal. 379; The Commissioners v. Bright, 18 Ind. 93; City of Aurora v. West, 22 Ind. 88; Augusta Bank v. Augusta, 49 Me. 407; Clark v. Janesville, 10 Wis. 130; Mills v. Glason, 11 ib. 470; Caldwell v. Justices of Burke, 4 Jones' Eq. (N. C.) 323; Powers v. the Inf. Ct. Dougherty Co., 23 Geo. R. 65; St. Jo. and C. R R. Co v. Buchanan County, 39 Mo. 485; City of St. Louis v. Alexandria, 23 ib. 183; Strickland v. Mississippi R. R. Co., 27 Miss. R. 209, 224; Cotton v. Commissioners of Leon County, 5 Fla. 610; Police Jury v. Succession of McDonough, 8 La. 341; San Antonio vs. Jones, 28 Texas, 19; Gilman v. Sheboygan, 2 Black. 510, and cases cited.

We find, then, that upon principle and reason there is the same authority for the exercise of the sovereign power of taxation in aid of the construction of railroads that there is for the exercise of the right of eminent domain, and that this view is sustained by an overwhelming weight of authority. Our plain duty, therefore, is to sustain the Act in question. And the question whether its enactment was dictated by a wise State policy or not we must leave to the General Assembly, where it exclusively belongs under the Constitution.

The order of the District Judge refusing the injunction is affirmed.

BECK, J., dissenting.

STATE OF IOWA, } ss.
SUPREME COURT. }

I, C. Linderman, Clerk of the Supreme Court of Iowa, do hereby certify that the foregoing pages contain a full, true, and complete copy of the opinion of said Court in the case of J. B. Stewart v. The Board of Supervisors, as full, true, and complete as the same remains on file and of record in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court this first day of November, A. D. 1870.

[SEAL.]

C. LINDERMAN,
Clerk Supreme Court.